NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1082, 18-1117

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED BUILDING SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

OPENING BRIEF OF PETITIONER/CROSS-RESPONDENT PLANNED BUILDING SERVICES, INC.

FOX ROTHSCHILD LLP

Stephen A. Ploscowe
49 Market Street
Morristown, NJ 07960
Tel: 973.994.7500
Fax: 973.992.9125
sploscowe@foxrothschild.com

Marvin L. Weinberg
2000 Market Street
20th Floor
Philadelphia, PA 19103
Tel: 215.299.2836
Fax: 215.299.2150
mweinberg@foxrothschild.com

Attorneys for Planned Building Services, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioner/Cross-Respondent Planned Building Services, Inc. certifies the following:

(A) Parties, Intervenors, and Amici. The parties in this matter are (i) Petitioner/Cross-Respondent Planned Building Services, Inc. ("PBS"), which was the respondent before the Board; (ii) Respondent/Cross-Petitioner the National Labor Relations Board ("Board"), whose General Counsel was a party before the Board; and (iii) Intervenor Service Employees International Union, Local 32BJ ("Local 32BJ" or "Union"), which was the charging party before the Board.

(B) Rulings Under Review. This case is before the Court on PBS's petition for review and the Board's cross-application for enforcement of the Decision and Order issued by the Board on December 15, 2017 at Case Nos. 02-CA-033146-1; 02-CA-033308-1; 02-CA-033558-1; 02-CA-033864-1; 02-CA-034018-1, and reported at 365 NLRB No. 162.

(C) Related Cases. Before being remanded to the Board, this case—at the request of the Union—was previously on review before the United States Court of Appeals for the Second Circuit, in the case captioned as *Service Employees International Union, Local 32BJ v. National Labor Relations Board*, Docket No. 10-36161-ag. The Second Circuit's opinion, which was filed on August 1, 2011, is reported at 647 F.3d 435. PBS is unaware of any related cases currently pending in

this Court or any other Court involving the same parties and the same or similar issues.

CORPORATE DISCLOSURE STATEMENT

PBS's parent companies are Planned Companies Holdings, Inc., The FirstService Residential, Inc., and FirstService Corporation. FirstService Corporation, which owns more than 10% of PBS's stock, is publicly traded on NASDAQ and the Toronto Stock Exchange.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Board Decisions

Statutes

GLOSSARY

"80-90 Maiden Lane" means the office building located at 80-90 Maiden Lane in New York, New York.

"2007 Decision and Order" or "2007 D&O" means the order issued by the National Labor Relations Board on August 30, 2007 and reported at 350 NLRB 998.

"2008 Decision and Order" or "2008 D&O" means the order issued by the National Labor Relations Board on March 27, 2008 and reported at 352 NLRB 279.

"ALJ" or "Judge" means Administrative Law Judge.

"ALJD" means the Administrative Law Judge Decision issued by Stephen Davis in this matter on May 13, 2003.

"APA" means the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.*

"AM Property" means AM Property Holding Corporation, which purchased 80-90 Maiden Lane from the Witkoff Group.

"Clean-Right" means Clean-Right, the in-house cleaning contractor at 80-90 Maiden Lane that was wholly owned by the Witkoff Group.

"Decision and Order," the "2017 Decision and Order" or "2017 D&O" means the Decision and Order issued by the National Labor Relations Board on December 15, 2017 and reported at 365 NLRB No. 162.

"Intervenor," "Local 32BJ" or the "Union" means Intervenor Service Employees International Union, Local 32BJ.

"NLRA" or the "Act" means the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*

"NLRB," the "Board" or "Respondent" means Respondent National Labor Relations Board.

"PBS," "Charged Party," or "Petitioner" means Petitioner Planned Building Services, Inc.

"Second Circuit" means the United States Court of Appeals for the Second Circuit.

"Servco" means Servco Industries, Inc., which replaced PBS as the cleaning contractor at 80-90 Maiden Lane.

"UWA" means the United Workers of America, which entered into a collective bargaining agreement with PBS at 80-90 Maiden Lane.

"Witkoff Group" means the Witkoff Group, which owned 80-90 Maiden Lane prior to AM Property Holding Corporation.

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of PBS to review and set aside, and the cross-application of the Board to enforce, a Board Order issued against PBS on December 15, 2017, and reported at 365 NLRB No. 162.

The Board had jurisdiction below under Section 10(a) of the Act, which authorizes the Board to prevent unfair labor practices affecting commerce. *See* 29 U.S.C. § 160(a). The Decision and Order is a final order, and PBS is a party aggrieved by the Decision and Order. *See Bell & Howell Co. v. NLRB*, 598 F.2d 136, 143 n.12 (D.C. Cir. 1979) ("When the Board enters a final order against the charged party, it is clear that the phrase 'any person aggrieved' in s[ection] 10(f) enables him to seek immediate review in the appropriate Court of Appeals.").

Both PBS's petition and the Board's cross-application are timely, as the Act places no limitation governing the timeliness of petitions for review of Board orders. *See NLRB v. Cent. Dispensary & Emergency Hosp.*, 145 F.2d 852, 854 (D.C. Cir. 1944).

Consistent with Section 10(f) of the Act, this Court has jurisdiction and venue properly lies in this Circuit. *See* 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board . . . may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia . . . .").

STATEMENT OF THE ISSUES PRESENTED

1. Due process requires that PBS have "meaningful notice of a charge and a full and fair opportunity to litigate it." *Lamar Central Outdoor*, 343 NLRB 261, 265 (2004) (General Counsel may not change his theory of litigation without amending his complaint, because doing so "would violate fundamental principles of procedural due process[.]"). The first issue before the Court is whether the Board's finding that PBS was an individual successor to Clean-Right should be denied enforcement on due process grounds because the theory of liability on which the Board relied—individual successorship—was not set forth in the General Counsel's complaint, not fully litigated in the hearing before the Administrative Law Judge, not closely connected to the joint employer issues actually litigated by the General Counsel, and not addressed in the ALJ's decision.

2. The Administrative Procedures Act mandates that the Board act "[w]ith due regard for the convenience and necessity of the parties or their representatives" such that "within a reasonable time, [it] shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). The second issue before the Court is whether the Board's December 15, 2017 Decision and Order should be denied enforcement because the Board's inexcusable delay—with nearly six years passing since the Board first accepted remand from the Second Circuit in 2011, and which was in addition to the more than four years that passed between the ALJ's initial

decision in 2003 and the Board's reversal of the ALJ's decision in 2007—vitiated the APA and resulted in the Board imposing draconian, punitive, and unlawful remedies that would have been unnecessary had the Board acted within a reasonable time.

STATEMENT OF THE CASE

More than 18 years ago, AM Property purchased a Manhattan office building, 80-90 Maiden Lane, and declined to hire the building's incumbent cleaning workers. The incumbent workers were employed by Clean-Right—a company wholly-owned by 80-90 Maiden Lane's prior owner, the Witkoff Group—and represented by Local 32BJ. Rather than hire the Clean-Right employees, AM Property hired PBS to perform cleaning services at 80-90 Maiden Lane. PBS held the cleaning contract at 80-90 Maiden Lane for less than 13 months from April 25, 2000 through May 15, 2001. After AM Property terminated PBS's cleaning contract, AM Property hired Servco as the building's cleaning contractor.

The present litigation began nearly 17 years ago when the General Counsel issued an amended consolidated complaint against numerous defendants, including PBS. It is undisputed that, as to PBS, the General Counsel's complaint proceeded solely under a theory that AM Property and PBS were joint employers—and thus joint successors—to Clean-Right. The General Counsel did not alternatively allege

that PBS was an individual successor to Clean-Right. Nor did the General Counsel alternatively allege that PBS individually violated Section 8(a)(5) of the Act.

This case now comes before the Court following a pair of multi-year Board delays totaling more than 10 years, with an intervening appeal by Local 32BJ to the Second Circuit. Following the ALJ's May 13, 2003 decision, PBS sought review with the Board, which issued the 2007 Decision and Order on August 30, 2007. The Board's decision was partially modified upon reconsideration in the 2008 Decision and Order, which issued on March 27, 2008.

Local 32BJ thereafter petitioned the Second Circuit for review. On August 1, 2011, the Second Circuit remanded to the Board. More than six years elapsed before the Board issued the 2-1 Decision and Order subject to this appeal. To comply with the various Board orders issued to date, including the 2017 Decision and Order, the Board has asserted that PBS must pay more than $1.25 million—substantially more than half of which accounts solely for interest payments purportedly due.

A. Background Facts and Procedural History

1. Nearly Two Decades Ago, PBS was Hired as the Cleaning Contractor at 80-90 Maiden Lane After AM Property Declined to Hire the Incumbent Cleaning Employees.

This case involves AM Property's purchase of a Manhattan office building, 80-90 Maiden Lane. J.A. 101-102; J.A. 82; J.A. 190. After closing on the building

on April 25, 2000, AM Property elected not to hire the employees of the building's incumbent, in-house cleaning contractor, Clean-Right—a company wholly-owned by 80-90 Maiden Lane's prior owner, the Witkoff Group. J.A. 102; J.A. 83; J.A. 190. Clean-Right's employees were represented by Local 32BJ. J.A. 101-102; J.A. 83; J.A. 190.

AM Property instead contracted with PBS to provide cleaning services at 80-90 Maiden Lane. J.A. 101-102; J.A. 83; J.A. 190. AM Property and PBS executed a contact for PBS to provide cleaning services at 80-90 Maiden Lane on April 25, 2000, the same day AM Property closed on its purchase of the building. J.A. 101-102; J.A. 83; J.A. 190.

PBS subsequently recognized the United Workers of America as the employees' bargaining representative at 80-90 Maiden Lane, and the parties entered into a collective bargaining agreement. J.A. 108; J.A. 83; J.A. 191. After less than 13 months, AM replaced PBS with Servco as the building's cleaning contractor. J.A. 112; J.A. 83; J.A. 200 PBS never recognized Local 32BJ as the bargaining representatives of the employees at 80-90 Maiden Lane. J.A. 109-110; J.A. 82; J.A. 199-200.

2. This Dispute Commenced With an Arbitration Filed by Local 32BJ in September 2000, Which Resulted in Termination and Severance Payments of More Than $300,000 to Clean-Right Employees.

On September 27, 2000, Local 32BJ arbitrated the issue of whether certain members employed by Clean-Right were entitled to termination pay after not being hired following AM Property's purchase of 80-90 Maiden Lane. J.A. 106 n.6; J.A. 88. The Arbitrator found that AM Property's decision to discontinue employment of the Clean-Right employees constituted a reduction of force, as defined by the applicable collective bargaining agreement, and awarded termination pay to Clean-Right employees who were not retained by AM Property. J.A. 106 n.6; J.A. 88. This termination pay to the Clean-Right employees was in addition to the employees' receipt of severance pay, with total payments to Clean-Right employees[1] represented by Local 32BJ exceeding $300,000. J.A. 106.

3. Following Arbitration, the Instant Litigation Commenced With Proceedings Before the ALJ Until May 2003 and Before the Board Until March 2008.

The Union then brought a litany of unfair labor practice charges against PBS and other defendants, with a consolidated complaint issued by the General Counsel on January 30, 2002. J.A. 99-100; J.A. 82. Pertinent to PBS's petition for review,

[1] All told, this group of individuals employed by Clean-Right received a windfall consisting of termination pay, severance pay, and additional backpay remedies ordered by the Board in the 2007 and 2008 Decisions and Orders.

the General Counsel's complaint alleged (i) that AM Property and PBS violated Sections 8(a)(1) and (5) of the Act by unlawfully failing to recognize and bargain with Local 32BJ upon AM Property's purchase of the building; and (ii) that AM Property and PBS, as joint employers, unlawfully refused to hire employees who had previously been employed at the building, in violation of Section 8(a)(1) and (3) of the Act. J.A. 99-101; J.A. 83; J.A. 200.

The ALJ rendered his decision on May 13, 2003, initially finding that (i) AM Property and PBS were joint employers; (ii) AM Property and PBS were joint successors of Clean-Right; and (iii) PBS violated the Act by (x) refusing to hire Local 32BJ's members, (y) refusing to recognize the Union, and (z) recognizing the UWA. J.A. 99; J.A. 83.

PBS subsequently sought Board review of the ALJ's decision of May 13, 2003. J.A. 83. The matter remained pending before the Board until it issued its Decision and Order on August 30, 2007—more than four years after the ALJ's initial decision. J.A. 94-95. In sum, the Board (i) reversed the ALJ's findings on both the joint employer and joint successor issues; (ii) held that AM Property and PBS did not have an obligation to bargain with Intervenor; and (iii) held that PBS did not violate the Act by recognizing the UWA. J.A. 83.

Subsequently, Local 32BJ and the General Counsel filed motions for reconsideration, and in a decision dated March 27, 2008—almost five full years

after the ALJ's initial ruling—the Board held that PBS violated Sections 8(a)(1) and (2) of the Act by unlawfully recognizing the UWA. J.A. 131-150; J.A. 151-157. Although the Union and General Counsel sought reconsideration on multiple issues, the Board declined to grant reconsideration as to (i) whether PBS violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize Local 32BJ as the bargaining representative of PBS's employees at 80-90 Maiden Lane, and (ii) whether the special remedies requested by Local 32BJ should be imposed on PBS. J.A. 151-152. In a Contingent Settlement Agreement approved by Region 2 on December 1, 2008, PBS paid $78,458.02 to resolve its backpay liability relating to the 2007 and 2008 Orders. J.A. 243.

4. More than a Decade After the Initial Arbitration, the Second Circuit Remanded to the Board in August 2011 to Consider Whether Individual Successorship Could be Decided Consistent with Due Process.

Following the Board's March 27, 2008 decision, Local 32BJ petitioned the Second Circuit for review, arguing that the Board erred by (i) finding that AM Property and PBS were not joint employers; (ii) failing to grant the Union additional remedies; and (iii) finding that the Board was precluded from determining whether PBS was individually a successor employer to Clean–Right because the Board failed to litigate a violation of the Act based on an individual successor theory. *See Serv. Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 439 (2d Cir. 2011) (J.A. 159-182).

On August 1, 2011, more than three years after the Board issued its 2008 Decision and Order, the Second Circuit vacated the Board's prior decisions, insofar as the Board found it was precluded from considering whether PBS was an individual successor to Clean-Right. *Id.* The Second Circuit remanded to the Board, "with instructions that the Board determine (1) whether PBS was a successor employer to Clean-Right and violated Section 8(a)(1) [&] (5) of the Act by failing to bargain with Local 32BJ; and (2) if so, whether such a ruling comports with due process, and, if it does not, whether remand to the ALJ is appropriate . . . ." *Id.* at 450 (J.A. 181-182).

The Second Circuit's opinion noted that the "Board may identify a violation of the Act that was not specifically alleged in the complaint or advanced by the General Counsel," but only "if the parties had sufficient notice to satisfy due process." *Id.* at 448 (J.A. 177). The Second Circuit further instructed the Board that it should apply its single-location presumption or articulate why this presumption is inapplicable. *Id.* at 449 (J.A. 180). The Board's 2007 and 2008 Decisions and Orders were enforced "in all other respects." *Id.* at 450 (J.A. 182).

5. The Board's December 15, 2017 Decision Issued Over a Vigorous Dissent by Former Board Chairman Phillip Miscimarra.

Nearly six years after the Board accepted remand from the Second Circuit, the Board held in a 2-1 decision issued on December 15, 2017, with former Board Chairman Phillip A. Miscimarra dissenting, that: (i) the previously unalleged and

unlitigated issue of whether PBS was an individual successor to Clean-Right was fully and fairly litigated, despite the individual successorship issue never having been litigated during the nearly two decades this case remained active; (ii) the actually alleged and litigated issue of whether PBS and AM Property were joint employers was closely connected to the wholly distinct issue of whether PBS was Clean-Right's individual successor, despite AM Property and Clean-Right being entirely separate entities, and the joint employer and individual successorship issues raising discrete factual and legal issues; and (iii) remand to the ALJ was unnecessary to permit the parties to litigate whether PBS was, in fact, an individual successor to Clean-Right. *See generally* J.A. 190-204.

6. The Board Denied PBS's Motion for Reconsideration in March 2018, With Both PBS and the Board Petitioning this Court for Review of the Board's Decision and Order.

PBS timely filed a Motion for Reconsideration with the Board on January 19, 2018, contending that the Board materially erred in (i) failing to appropriately analyze whether the individual successor issue was fully and fairly litigated; (ii) improperly conflating the actually litigated joint employer issue with the unalleged and unlitigated individual successor issue in finding that a close connection existed between the issues; (iii) failing to remand to the ALJ to permit the parties to litigate the individual successorship issue; and (iv) delaying more than six years in issuing the 2017 Decision and Order. J.A. 208-210.

The Board denied PBS's motion on March 6, 2018. J.A. 226. On March 20, 2018, PBS petitioned this Court for review of the Board's 2017 Decision and Order. Thereafter, the Union sought leave to intervene in a motion filed on March 27, 2018, which this Court granted on May 24, 2018.

On May 2, 2018, the Board filed a cross-application for enforcement of the 2017 Decision and Order at Case No. 18-1117, which this Court consolidated with Case No. 18-1082 as cross-appeals on May 9, 2018.

7. The Board's Compliance Correspondence of June 8, 2018 Requested Payment From PBS of More Than $1.25 Million to Comply with its Various Decisions and Orders.

Subsequent correspondence from Region 2 dated June 8, 2018[2] confirms the Board's position that PBS must make payments in excess of $1.25 million to comply with the various Board orders[3], including payments totaling $947,634[4] to comply with the 2017 Decision and Order. J.A. 228-243.

---

[2] The Board's June 8, 2018 letter is part of the record under Fed. R. App. P. 16(a) ("The record on review or enforcement of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.").

[3] The 2007 and 2008 Decisions and Orders addressed the 8(a)(3) violations and "provided make-whole relief only for those Clean-Right discriminatees whom PBS refused to hire." J.A. 197. PBS has already paid $78,458.02 to those individuals pursuant to a Contingent Settlement Agreement approved by Region 2 on December 1, 2008. J.A. 243.

[4] This is in addition to the $305,351.71 the Board contends PBS owes to resolve the 8(a)(3) violations relating to the 2007 and 2008 Decisions and Orders. This represents $165,193 attributable to backpay and $221,826 in interest

According to the Board, the payments purportedly due from PBS represent: (A) $621,614 attributable to backpay, including (i) $232,095 in backpay; (ii) $311,879 in interest payments on backpay; and (iii) $77,460 in excess taxes owed on backpay; and (B) $326,020 attributable to benefits, including (i) $146,769 payable to five separate Union funds; and (ii) $179,251 in interest payments on amount amounts owed to the Union funds. J.A. 243.

Based on the Board's calculations in its June 8th letter, interest has compounded[5] for the past 17 years, from June 15, 2001 through the present. For the 2017 Decision and Order, the interest payments purportedly due total almost $500,000 and represent nearly 52% of the amounts allegedly owed.

STANDARD OF REVIEW

This Court's review of the Board's decision is "limited" but "not without substance." *David Saxe Prods., LLC v. NLRB*, 888 F.3d 1305, 1311 (D.C. Cir.

---

payments, less the amounts paid by PBS under the Contingent Settlement Agreement. J.A. 243.

[5] The Board's delay in this matter has improperly inflated the amount allegedly owed to these employees, with the Board applying a daily compounded interest rate, a formula which the Board did not adopt until 2010, and which would have been inapplicable had the Board not twice delayed in resolving these matters. Additionally, as to both the 8(a)(3) and 8(a)(5) allegations, the applicable "make whole" remedies were calculated with reference to the Union's then-applicable collective bargaining agreement, despite the fact that Local 32BJ never requested that PBS bargain with Local 32BJ while it held the cleaning contract at 8-90 Maiden Lane. J.A. 233.

2018). To that end, this Court "must uphold the judgment of the Board unless, upon reviewing the record as a whole, [it] conclude[s] that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Bellagio, LLC v. NLRB*, 854 F.3d 703, 708 (D.C. Cir. 2017). "[D]eference is not warranted where the Board fails to adequately explain its reasoning, [or] where the Board leaves critical gaps in its reasoning." *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016).

Additionally, this Court "must withhold enforcement of orders that will not effectuate any reasonable policy of the act, even where the problems with the order are caused primarily by the lapse of time between the practices complained of and the remedy granted." *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 379 (2d Cir. 1990).

SUMMARY OF ARGUMENT

Initially, the Board's Decision and Order violates PBS's due process rights and should not be enforced because the issue of whether PBS was an individual successor to Clean-Right was never litigated before the ALJ. Because the General Counsel's theory of the case focused exclusively on whether PBS and AM Property were joint employers, the Board's finding that PBS was an individual successor to Clean-Right violates well-settled notions of due process.

Indeed, AM Property (purportedly a joint employer with PBS) and Clean Right (the in-house cleaning contractor that preceded PBS) are wholly separate and unrelated corporate entities. And, the actually-litigated joint employer issue and the never-litigated successorship issues constitute two distinct factual and legal issues.

Additionally, the Board's Decision and Order should not be enforced because the Board's inexcusable delay—with nearly six years passing since the Board first accepted remand from the Second Circuit—vitiated the APA's requirement that the Board act within a reasonable time in deciding matters before it. The Board's substantial, years-long delay resulted in the Board seeking to impose draconian and punitive remedies on PBS, which include payments of more than $1.25 million to comply with the various Board orders. This includes nearly $1 million to comply with the 2017 Decision and Order, more than half of which is attributable solely to interest payments. Illustrative of the impact of the Board's dilatory conduct is a $77,460 "excess tax" payment purportedly owed by PBS, which is based on a March 2016 Board decision, and which would be wholly inapplicable had the Board concluded this case within a reasonable time.

ARGUMENT

I. Due Process Precludes the Board From Reaching the Issue of Whether PBS Was an Individual Successor to Clean-Right.

Consistent with notions of due process, "[t]he Board may not find and remedy a violation of the Act not specified in the complaint unless the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Bellagio*, 854 F.3d at 712-13. "[W]hether a matter has been fully litigated rests in part on . . . whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament United Sales*, 296 NLRB 333, 335 (1989). "Under the closely connected standard, the employer must be informed of the acts forming the basis of the complaint, but not necessarily the legal theory upon which the General Counsel intends to proceed." *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 558 (5th Cir. 2013) (quotations and citations omitted). Because neither prong of the due process analysis can be satisfied in the present case, this Court should decline to enforce the Board's Decision and Order.

A. The Issue of Individual Successorship Was Not Fully and Fairly Litigated Before the ALJ.

The Second Circuit's directives on remand were clear, and the Board erred because it should have first "determined, based on the facts in the record, whether the issue of PBS's status as an individual successor to Clean-Right had been fully

litigated . . . ." *Service Employees Int'l Union, Local 32BJ*, 647 F.3d at 448-49; J.A. 200 ("The Court directed the Board to determine whether this unalleged 'individual successor' issue may be decided on the existing record consistent with due process . . . .") (Miscimarra, dissenting). Only if the Board determined that the existing factual record supported a finding that the individual successor issue was fully litigated could the Board address whether the individual successorship issue "was sufficiently related to the underlying complaint . . . ." *Service Employees Int'l Union, Local 32BJ*, 647 F.3d at 448-49; J.A. 200, n.3 ("Because I would find that the issue of PBS's status as an individual successor to Clean-Right has not been fully litigated, I need not and do not reach whether the 'individual successor' theory is closely connected to the unfair labor practice complaint.") (Miscimarra, dissenting).

The Board, however, disregarded the Second Circuit's directive and reversed the due process analysis. The Board first addressed whether the individual successorship issue was "closely related" to joint successorship issue, and after finding that it was "in all practical terms identical," it was a *fait accompli* that the issue had been fully litigated. J.A. 192 ("The issue of single successorship is not only 'closely related' to the complaint allegation of joint successorship; it is in all practical terms identical.").

The Board's analysis is legally unsupportable and undermines PBS's due process rights. The Board must actually examine the existing factual record because "whether a charge has been fully and fairly litigated is so peculiarly fact-bound as to make every case unique; a determination of whether there has been full and fair litigation must therefore be made on the record in each case." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990).

The Board admitted that the present record lacks any evidence concerning individual successorship, stating that because the individual and joint successor issues were identical, "PBS's failure to introduce such evidence" before the ALJ does not deprive PBS of due process, "since the purported evidence is either irrelevant or would not require a different result even if adduced and credited." J.A. 193. The Board's "no harm, no foul" approach turns due process on its head, finding that PBS, in essence, waived its right to present evidence on an issue that "was not alleged in the Union's complaint or advanced by the General Counsel." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 448; J.A. 191 ("The complaint did not allege in the alternative that either PBS or AM was individually a successor or that either entity individually violated Section 8(a)(5).")

Dissenting Chairman Miscimarra correctly identified the flaw in the Board's analysis: since the "General Counsel's theory of the case was that PBS and AM were joint employers and therefore joint successors with a joint obligation to

recognize and bargain with the Union, PBS could have reasonably chosen a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue." J.A. 200 (Miscimarra, dissenting).

That is precisely what PBS did, with PBS's defense focusing on whether it was a joint employer with AM Property (the party with which PBS contracted), not whether it was an individual successor to Clean-Right (a wholly different entity than AM Property). "When the record was created at the unfair labor practice hearing, PBS was not on notice that the evidence being adduced might be used to support a claim that it was *individually* Clean-Right's successor and *individually* violated Section 8(a)(5) of the Act by failing to recognize and bargain with the Union." J.A. 200 (Miscimarra, dissenting) (emphasis in original).

PBS would have modified its litigation strategy if the General Counsel had pursued a theory of individual successorship, and "whether a matter has been fully litigated rests in part on . . . whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament*, 296 NLRB at 335. Indeed, PBS's litigation strategy was borne of the fact that this case concerned a flurry of claims involving a new building owner (AM Property) that terminated the Witkoff Group's highly-paid cleaning staff (Clean-Right, which served as an accessory to a developer, rather than as a for-profit cleaning business),

hired and fired PBS, and then hired another company (Servco) to handle the building's cleaning services—all in a span of 13 months.

"It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion Int'l Corp.*, 339 NLRB 672, 673 (2003). Both the Board and the Second Circuit agree that "not once, but twice [] the General Counsel did not litigate this case on the theory that PBS individually was Clean-Right's successor." J.A. 200 (noting that the "General Counsel neither litigated a theory of individual successorship at the unfair labor practice hearing nor joined the Union's attempt to urge that theory on reconsideration") (Miscimarra, dissenting); *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 448. Consequently, the Board erred in holding that PBS was fairly afforded an opportunity to focus its defense on individual successorship issue, when PBS was never aware it was necessary to defend against such a theory of liability in the first place. *See Indep. Elec. Contractors of Houston, Inc.*, 720 F.3d at 552–54 (declining to enforce Board's order on due process grounds because, *inter alia*, "[e]ven if this internally inconsistent theory had been timely asserted, the Respondent could not have known what kind of defense to pursue").

B. The Unalleged Individual Successor is Wholly Unconnected to the Actually Litigated Joint Employer Issues.

Even if the individual successor issue was, in fact, fully and fairly litigated (which it was not), due process permits the Board to find an unalleged violation of

the Act only if the issue "is closely connected to the subject matter of the complaint." *Pergament*, 296 NLRB at 334.

In the present case, the Board's majority held that a "close connection" existed on successorship because "the test for single successorship is entirely subsumed within the test for joint successorship." J.A. 195. This conclusion, however, disregards the allegations "which formed the basis of the complaint" and the issues affirmatively litigated by the General Counsel. As stated by the Board majority, "the General Counsel's complaint alleged that AM and PBS [were] joint employers" and thus joint successors. J.A. 195.

Both as a legal and factual matter, whether PBS and AM were joint employers—the threshold issue that must be resolved before reaching any successorship issues—is entirely independent of whether PBS was an individual successor to Clean-Right.

As recognized by the Second Circuit, the legal and factual analysis related to the joint employer issue focused on the supervisory and hiring tasks purportedly performed by AM Property employee Dennis Henry, and, in particular, the "limited and routine" supervisory tasks Henry performed for PBS. *See Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 442-43; J.A. 169 (noting that "an essential element of any joint employer determination is sufficient evidence of immediate control over the employees, namely, whether the alleged joint employer

(1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process") (quotations and citations omitted).

The joint employer issue—which examined the legal and factual relationship between PBS and AM Property—is completely unrelated to the individual successor issue, which requires examination of the relationship between PBS and Clean-Right, and, in particular, "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

Chairman Miscimarra rightly noted this lack of connectivity between the joint employer and individual successor issues, stating in his dissent that "a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue . . . would have been focused on demonstrating that PBS and AM did not share or codetermine those matters governing the essential terms and conditions of employment of PBS's employees . . . ." J.A. 203 (Miscimarra, dissenting). That is, in fact, what PBS succeeded in doing.

Even if certain evidence adduced to defeat the General Counsel's joint employer theory overlaps with evidence bearing on the separate individual successor issue, "the presence of evidence in the record to support a charge unstated in a complaint . . . does not mean the party against whom the charge is made had notice that the issue was being litigated." *Enloe Med. Ctr.*, 346 NLRB 854, 855 (2006). "[T]he issue is not whether such evidence exists, but whether the Respondent was given a fair opportunity to present such evidence." *Id.* at 856 n.7; *Conair Corp. v. NLRB*, 721 F.2d 1355, 1371 (D.C. Cir. 1983) ("[T]he critical issue is not whether there is substantial evidence in the record indicating that the mailgram occasioned actual termination of the strikers' employment. That issue [] should not have been reached by the Board, for Conair was never told before the hearing record closed that the stakes included liability for discharges effected on April 22, 1977.").

Thus, the Board's majority improperly conflated the joint employer and successorship issues in reaching the Union's preferred conclusion, which only serves to further amplify the due process defects.

C. Remand to the ALJ Would Satisfy Due Process.

Because due process is lacking for PBS, the necessary follow up question is "whether remand is appropriate under *Enloe*." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 449; J.A. 180 ("[I]f the Board finds that due process concerns do

preclude it from reaching this issue, it should determine whether remand is appropriate under *Enloe*."); J.A. 198 ("The Court directed the Board to determine whether this unalleged 'individual successor' issue may be decided on the existing record consistent with due process, and if not, whether a remand to the administrative law judge is warranted to provide PBS an opportunity to litigate this issue.") (Miscimarra, dissenting).

Given the Board's extraordinary delay in processing this matter, and as discussed *infra*, this Court should vacate the Board's Decision and Order. *See TNS, Inc. v. NLRB*, 296 F.3d 384, 403 (6th Cir. 2002) (noting that courts can "refuse to enforce agency awards when undue delay has made their enforcement inequitable" and vacating a Board decision when the initial case was filed in 1982, but "the Board did not issue its second decision until September 1999, more than four years" after accepting remand from the D.C. Circuit).

Nonetheless, the more circumscribed remedy of remand to the ALJ would likewise comport with due process. *See Enloe*, 346 NLRB at 856 ("We have . . . taken the lesser step of remanding for further hearing on the issue . . . ."). Remand would "remedy any prejudice suffered by" PBS and "provide the Respondent an opportunity to litigate" an alleged violation of the Act that "was not alleged or actually litigated." *Id.*; *Roundy's Inc. v. NLRB*, 674 F.3d 638, 646 (7th Cir. 2012) (rejecting argument "that the Board erred in remanding the case for further

evidence on the General Counsel's property right theory because this theory was not raised in the complaint or during the hearing before the ALJ" and "find[ing] that the Board acted within its discretion in remanding the case").

Remand will permit the parties to litigate a number of issues intimately related to the unalleged individual successorship theory, including:

- ***Whether the bargaining unit at 80-90 Maiden Lane remained appropriate***. "[C]entral to a finding of legal successorship is whether the bargaining unit that the union seeks to represent remains appropriate under the successor's operations." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 448; J.A. 178. The Board's majority concluded that, since a single-unit presumption applies relative to appropriate bargaining units, that was, in effect, good enough to find PBS liable. J.A. 197. However, "the issue of whether the surviving unit of PBS employees at 80-90 Maiden Lane remained appropriate has not been fully litigated. The Court instructed the Board to apply its presumption that a single-location unit is appropriate. But this presumption is rebuttable, and PBS is entitled to an opportunity to rebut it." J.A. 202 (Miscimarra, dissenting).

Tellingly, the record evidence that does exist casts doubt on whether the bargaining unit remained appropriate in this case; in particular the fact that "AM displaced some union-represented Clean-Right employees when it directly hired its own elevator operator and day porters to work at 80-90 Maiden Lane . . . . PBS is

entitled to an opportunity to litigate whether the PBS unit remained appropriate in light of the removal of the elevator operator and day porter *positions* from the previous Clean-Right unit." J.A. 202 (Miscimarra, dissenting) (emphasis in original).

- ***Whether a multi-location unit, rather than a single-location unit, is appropriate.*** Related to the issue of bargaining unit composition is the propriety of a multi-site bargaining unit. The Board's majority performed a perfunctory analysis on the multi-site issue that "focus[ed] . . . on the surviving employing unit alone, and the extent to which, from the employees' perspective, the unit differs from its predecessor unit." J.A. 193 Notably, the Board failed to apply the multiple factors of the single-location test, focusing almost exclusively on the experience of individual employees. J.A. 193.

However, even taking the Board's "employee-viewpoint" analysis at face value, its conclusion is directly contradicted by the existing record evidence detailing the experiences of the former Clean-Right employees. PBS sent former Clean-Right employee Zolia Gonzalez a written offer of employment, but when she "reported to work, she was met by Henry, who presented her with a work cart and a mop. Gonzalez protested that ***she had not previously been required to perform this type of heavy work*** . . . ." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 440; J.A. 163 (emphasis added).

Thus, the Board majority's treatment of all building cleaning operations as similar is belied by the record evidence confirming that PBS modified certain job duties and did not continue Clean-Right's operations uninterrupted. The Board's overly simplistic analysis on the single-site issue confirms that PBS "has raised legitimate questions regarding this issue that cannot be adequately answered on the existing record" and that, if remand occurred, PBS may "ultimately succeed in rebutting the presumption that a unit limited to its employees at 80-90 Maiden Lane was appropriate . . . ." J.A. 203 (Miscimarra, dissenting).

- ***Whether substantial continuity of operations existed between PBS and Clean-Right***. Another issue inexorably intertwined with the composition of the bargaining unit is whether there existed substantial continuity of operations between PBS and Clean-Right. If there was, in fact, no substantial continuity of operations between the two entities, then PBS had no obligation to recognize or bargain with the Union. Remand is warranted "to untangle the issue of substantial continuity of operations from issues relating to unit appropriateness." J.A. 203, n. 9 (Miscimarra, dissenting).

- ***Whether, if PBS was an individual successor to Clean-Right, PBS had the right to set initial terms of employment that differed from Clean-Right's terms of employment***. Even if PBS is found to be Clean-Right's successor, it remains an open issue as to whether, under *Love's Barbeque*, 245 NLRB 78

(1979), "PBS forfeited its right . . . to set initial terms and conditions of employment that differed from Clean-Right's." J.A. 199, n.3 (Miscimarra, dissenting). The portion of *Love's Barbeque* holding that an employer forfeits its right, under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), to set initial terms and conditions of employment after refusing to hire a predecessor's employees "deviates from the Supreme Court's holding in *Burns* that a successor is not bound by its predecessor's contractual obligations but rather is free to set its own initial employment terms." J.A. 199, n.3 (Miscimarra, dissenting).

Thus, at minimum, remand is necessary to "permit [PBS] to present evidence that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals." J.A. 199, n.3 (Miscimarra, dissenting).

- ***Whether, if PBS was an individual successor to Clean-Right, PBS was obligated to bargain with the Union***. Finally, even if PBS is found to be Clean-Right's individual successor, the issue remains whether PBS was obligated to bargain with the Union. "In the successorship situation, the successor employer's obligation to recognize the union attaches after the occurrence of two

events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a substantial and representative complement of employees, a majority of whom were employed by the predecessor. . . . [T]he employer's obligation to recognize the union commences at that time, as soon as those two events have occurred . . . ." *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 344 n.8 (1999).

While the Board majority concluded that no bargaining demand was necessary because PBS refused to hire the former Clean-Right employees, this approach improperly rewrites the successorship test. Since "the union's demand establishes the moment in time when the Board evaluates when the other prerequisites to successor status have been satisfied. . . . [T]he Board must also permit PBS to present evidence on this issue on remand." J.A. 203, n.9 (Miscimarra, dissenting).

D. Applicable Circuit Precedent Regarding Due Process is Consistent with Member Miscimarra's Dissenting Opinion.

The detailed and cogent dissent authored by Miscimarra is perhaps the best evidence that the multitude of individual successorship issues are worthy of further review before the ALJ. As to threshold due process issue, "the issue of PBS's status as an individual successor to Clean-Right has not been fully litigated" because "a litigation strategy aimed at defeating the General Counsel's case on the

threshold joint-employer issue . . . would have been focused on demonstrating that PBS and AM did not share or codetermine those matters governing the essential terms and conditions of employment of PBS's employees." J.A. 203.

Miscimarra's position is consistent with this Circuit's precedent. *See Bellagio*, 854 F.3d at 713 (reversing, on due process grounds, "the Board's holding that [employer] engaged in unlawful coercion by telling [employee] not to discuss his [suspension]. [Employer] was not charged with any such unfair labor practice, . . . [and] never had an opportunity to defend itself against this charge because it was not in the complaint issued by the Board's General Counsel and it was not an issue in the case that was tried before the ALJ.").

When the Board's decisions do not comport with due process, this Court has previously declined enforcement and remanded to cure the due process issues. *See Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, Local No. 111 v. NLRB*, 792 F.2d 241, 245 (D.C. Cir. 1986) (NLRB precluded from finding that union local violated the Act by indirectly coercing employer to replace workers from other locals affiliated with same union with local members, where violation was not charged in General Counsel's complaint and NLRB did not contend that violation was actually litigated at any point during course of proceedings); *Ne. Indiana Bldg. & Const. Trades Council v. NLRB,* 352 F.2d 696, 699 (D.C. Cir. 1965) (remanding for dismissal because where General Counsel's

complaint charged that unions engaged in ULP in picketing for a "hot cargo" contract, it was improper for the Board to hold that the unions engaged in the picketing for a different purpose; "petitioners were entitled to assume that they had only to defend against a charge that their illegal object was to secure illegal contracts" and "were found guilty by the Board of entertaining an entirely different object").

Remanding to the ALJ—with a subsequent Board appeal likely occurring thereafter—would, in all likelihood, "return the parties to what has aptly been described as a new dimension – one where time has little meaning." *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 190 (2d Cir. 1991). Nonetheless, due process "is a basic tenet of Anglo-American law," and should this Court determine that something less than an order vacating the Board's Decision and Order is warranted, PBS must be granted "the right to be notified of the specific charges raised against [it] and an opportunity to defend [it]self against them." *Pergament*, 920 F.2d at 134.

II. The Board's Decision and Order, Which Issued Only After Substantial and Inexcusable Delay, Vitiated the APA and Should Not be Enforced.

Courts "cannot turn a blind eye to the extensive administrative delay by the Board." *Olivetti*, 926 F.2d at 189. Although "the Board had a duty to act promptly in the discharge of its important functions," it "stands out as a federal administrative agency which has been rebuked before for what must strike anyone

as a cavalier disdain for the hardships it is causing." *NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999).

Board delays negatively impact employers, as "[p]rotracted delay . . . increases the likelihood that the remedy imposed on the employer will become draconian." *Olivetti*, 926 F.2d at 189. "Employers are [] harmed by excessive delay, since a company's liability for any violation ultimately found continuously escalates while the case is pending." *Emhart Indus.*, 907 F.2d at 379. That is precisely what occurred here, with PBS holding the cleaning contract at 80-90 Maiden Lane for less than 13 months between April 2000 and May 2001, and with the Board ordering that PBS make whole the former Clean-Right employees for backpay and accrued interest covering almost two decades.

A. This Court Should Decline to Enforce the Decision and Order Due to the Board's Repeated, Inexcusable Delays.

The APA mandates that the Board act "[w]ith due regard for the convenience and necessity of the parties or their representatives" such that "within a reasonable time, [it] shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). "[T]he NLRB, like other federal agencies, has a statutory duty to conclude its proceedings within a reasonable time." *Emhart Indus.*, 907 F.2d at 379 (quotations and citations omitted). When the Board fails to act "within a reasonable time" and the Board's inexcusable delay prejudices a litigant, courts decline to enforce such "inequitable" decisions. *See TNS, Inc.*, 296 F.3d at 403.

B. The Board's Repeated Delays Establish a Violation of the APA.

The Board's insistent inaction in this matter demonstrates that the Board has not fulfilled its statutory duty. The General Counsel first issued its complaint in this matter in 2002—more than 16 years ago—alleging that AM Property and PBS were joint employers and joint successors to Clean-Right. J.A. 99-100. Since then, the Board has sat on its hands on two separate occasions for a period of more than a decade.

Initially, following litigation before the ALJ, which concluded with the AJJ's decision dated May 13, 2003, the Board took more than four years to issue a decision dated August 30, 2007, reversing the ALJ's erroneous findings on the joint employer issues. J.A. 82. By the time the Board ruled on the Board's and Union's reconsideration motions on March 27, 2008, more than five years had passed since the ALJ's initial decision in 2003. J.A. 151. Then, after the Second Circuit remanded to the Board on August 1, 2011, *see Serv. Employees Int'l Union, Local*, 647 F.3d at 436, more than six years elapsed before the Board issued its Decision and Order on December 15, 2017. *See generally* J.A.190-204. To deem it reasonable for the Board to twice delay more four years, with the most recent delay spanning six years, is to stand the APA on its head.

C. Courts Have Vacated Delayed Board Orders Under Circumstances Similar to the Present Case.

Because the Board's prolonged delays are "deplorable," *Sw. Merch. Corp. v. NLRB*, 943 F.2d 1354, 1358 (D.C. Cir. 1991), courts have denied enforcement of Board orders under circumstances similar to the present case. For example, in *Emhart Industries*, when nearly four years elapsed between the ALJ's decision and Board's order, the Second Circuit held that "enforcement [of the Board's order] should be denied because of the prejudicial effects of the board's delay in deciding this case." *Emhart Indus.*, 907 F.2d at 376. In *Emhart*, more than seven years passed between the allegedly unlawful acts and the Second Circuit's decision. *Id.* at 374-375.

In *Olivetti*, the Second Circuit held "that enforcement of the Board's remedy more than six years after the misconduct would truly mock reality." *Olivetti*, 926 F.2d at 189 (citing *Emhart*). The parties in *Olivetti* experienced similar delay as in *Emhart*, with the employer's allegedly unlawful acts occurring in 1983, the union's filing of an unfair labor practice charge occurring in 1984, the AJD's decision issuing in 1985, and the relevant Board orders issuing only after nearly two-year and three-year delays while pending before the Board. *See id.; see also NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 232 (2d Cir. 1983) ("Four years have elapsed since the charges against respondent were filed, and more than two and one-half

years have gone by since the hearing on those charges was held. In the exercise of our equitable power . . . we decline to remand . . . .").

The Sixth Circuit reached a similar conclusion in *TNS, Inc.*, noting "the undisputed fact is that the case was filed with the Board in 1982. The Board's ALJ did not issue a decision until 1987. The Board did not issue its decision affirming the ALJ until 1992, more than five years later. After remand by the District of Columbia Circuit in 1995, the Board did not issue its second decision until September 1999, more than four years later." *TNS, Inc.*, 296 F.3d at 404. Under the circumstances, the Sixth Circuit "VACATE[D] the Board's decision . . . rather than remanding it for further consideration," as "this court does not see a reasonable way to hold the Company responsible for damages accruing over all of this time, especially when its structure and business changed in the interim." *Id.* (capitalization in original). This Court should follow these well-reasoned precedents.

D. The Board's Delay Resulted in the Imposition of Draconian Remedies that Fail to Effectuate the Act and Would Be Wholly Inapplicable Had the Board Acted in a Reasonable Time Period.

The Decision and Order provides, in relevant part, that the "remedy for the 8(a)(5) violation we have found" is (i) backpay and benefits from April 25, 2000 through June 15, 2001, "computed . . . with interest . . . compounded daily"; (ii) monies to "compensate affected employees for the adverse tax consequences . . . of

receiving a lump-sum backpay award"; and (iii) "payments . . . to the employee benefit funds" and "reimburse[ment] . . . for any expenses resulting from its failure to make such payments." J.A. 197. Given the Board's extraordinary delay in processing this matter, the Board's remedy, as applied to the specific facts of this case, is draconian, punitive, and thus unlawful.

Currently, it is the Board's position that compliance with the 2017 Decision and Order requires payments from PBS totaling $947,634[6], which includes nearly $500,000 in interest that has accrued over the past 17-plus years. J.A. 243. Payment of nearly a half million dollars in interest is facially absurd, given that PBS held the cleaning contract at 80 Maiden Lane for less than 13 months. *See NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 787 (4th Cir. 1971) (The Act must be interpreted and applied to avoid "produc[ing] an absurd result.").

Indeed, in the more than 6,725 days that have passed since AM Property terminated PBS as the cleaning contractor at 80-90 Maiden Lane, this case has stalled with the Board for more than 3,000 of those days. Yet, in fashioning a remedy, the Board constructed a remedy that fails to account for the Board's own dilatory conduct.

---

[6] This is in addition to the $305,351.71 the Board contends is owed to resolve the 8(a)(3) violations relating to the 2007 and 2008 Decisions and Orders. J.A. 243.

"[T]he Board's remedy must be truly remedial and not punitive. . . . [A] backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009–10 (D.C. Cir. 1998) (quotations and citations omitted). In the present case, payments by PBS in excess of $1.25 million to resolve all outstanding Board orders is punitive rather than remedial.

In reviewing the Board's 2017 Decision and Order, this Court is charged with "examin[ing] carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy which can fairly be said to effectuate the purposes of the Act." *Id.* Because interminable Board delay has resulted in the imposition of "draconian" remedies on PBS, this Court's "enforcement of the remedial action taken by the Board furthers no purpose of the Act." *Olivetti*, 926 F.2d at 189.

The Board's unnecessary delay also resulted in the issuance of a specifically pernicious "excess tax" remedy that would be entirely unnecessary, but for the Board's delay. J.A. 197. The Board's imposition of the "excess tax" remedy is based on a 2016 Board decision, *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (Mar. 11, 2016). Had the Board acted within a "reasonable" time period, as required under the APA—such as, for example, if the Board had "only" delayed

four years in issuing its decision on remand from the Second Circuit—this excess tax remedy would not have existed or applied[7].

In effect, because the Board did not act "within a reasonable time," as required by the APA, the Board has ordered that PBS "fix" a problem it had no hand in creating. This is a textbook example of inequity and likewise violates the Board's retroactivity precedents. *See Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993) (board will not apply new rule if "retroactive application will produce manifest injustice"); *Aramark Sch. Servs., Inc.*, 337 NLRB 1063, 1063 (2002) ("[T]he propriety of retroactive application is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.").

Not surprisingly, the Board's majority opinion sidesteps the delay issue entirely. Despite the Board bearing responsibility for the majority of the delay in this case, the Board apparently believes that PBS should bear the burden, in the

---

[7] The same rationale applies to the interest rate applied by the Board in calculating PBS's alleged liabilities for both the 8(a)(3) and 8(a)(5) violations. The Board's imposition of a compounding daily interest rate is based on a 2010 Board decision—*Kentucky River Medical Center*, 356 NLRB 6 (2010)—that was not decided until nearly a decade after this case was first filed. Given the unexplainable and inexcusable Board delay in processing this case, the shift from simple interest to compound interest has led to a proposed damages figure where the interest payments well exceed the backpay amounts. Application of compounding interest leads to an absurd and punitive remedy that also violates the Board's retroactivity precedents.

form of significant interest payments, for delay issues wholly outside of PBS's control. This is inconsistent with the Act's remedial purposes.

CONCLUSION

For the foregoing reasons, PBS respectfully requests that the Court vacate the Board's Decision and Order and deny the Board's cross-petition for enforcement, or in the alternative, remand to the ALJ to permit the parties to litigate the issue of whether PBS was an individual successor to Clean-Right.

Respectfully submitted,

FOX ROTHSCHILD LLP

/s/ Marvin L. Weinberg
Marvin L. Weinberg, Esquire
2000 Market St., 20th Floor
Philadelphia PA 19103-3222
Tel: 215.299.2836
Fax: 215.299.2150
mweinberg@foxrothschild.com

Stephen A. Ploscowe, Esquire
49 Market Street
Morristown NJ 07960-5122
Tel: 973.994.7500
Fax: 973.992.9125
sploscowe@foxrothschild.com

Attorneys for Petitioner/Cross-Respondent, Planned Building Services, Inc.

Dated: December 18, 2018

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED BUILDING SERVICES, INC., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ, Intervenor.	Consolidated Case Nos. 18-1082; 18-1117 NLRB Case Nos. 02-CA-033146-1 02-CA-033308-1 02-CA-033558-1 02-CA-033864-1 02-CA-034018-1

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), PBS certifies that its brief complies with the type-volume limitations in Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the document contains 8,922 words.

The document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document was prepared in Times New Roman 14-point font using Microsoft Word 2016.

FOX ROTHSCHILD LLP

/s/ Marvin L. Weinberg
Marvin L. Weinberg, Esquire
2000 Market St., 20th Floor
Philadelphia PA 19103-3222
Tel: 215.299.2836
Fax: 215.299.2150
mweinberg@foxrothschild.com

Stephen A. Ploscowe, Esquire
49 Market Street
Morristown NJ 07960-5122
Tel: 973.994.7500
Fax: 973.992.9125
sploscowe@foxrothschild.com

Attorneys for Petitioner/Cross-Respondent, Planned Building Services, Inc.

Dated: December 18, 2018

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED BUILDING SERVICES, INC., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ, Intervenor.	Consolidated Case Nos. 18-1082; 18-1117 NLRB Case Nos. 02-CA-033146-1 02-CA-033308-1 02-CA-033558-1 02-CA-033864-1 02-CA-034018-1

CERTIFICATE OF SERVICE

I hereby certify that, on December 18, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system, and that I certify that the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system.

/s/ Marvin L. Weinberg
Marvin L. Weinberg, Esquire
2000 Market St., 20th Floor
Philadelphia PA 19103-3222
mweinberg@foxrothschild.com

STATUTES AND REGULATIONS

5 U.S.C. § 555

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of [29 U.S.C. § 158(a)(3)].

29 U.S.C. § 158

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; …

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; …

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

29 U.S.C. § 160

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.